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HOUSE OF REPRESENTATIVES
RPT. 101-281
Part 1

AMENDING SECTION 511 OF THE CONTROLLED SUBSTANCES ACT TO MAKE TECHNICAL, CLARIFYING, AND ADMINISTRATIVE AMENDMENTS, AND FOR OTHER PURPOSES

OCTOBER 13, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 2806 which on June 29, 1989, was referred jointly to the Committee on the Judiciary and the Committee on Energy and Commerce]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2806) to amend section 511 of the Controlled Substances Act to make technical, clarifying, and administrative amendments, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

BACKGROUND

Probably the single most important crime problem in this country is the vast increase in drug trafficking in recent years and the huge fortunes the illicit drug dealers have been able to accumulate. Ordinary criminal fines and prison sentences seem to provide little deterrence to this criminal activity, and in fact, these large scale organizations appear to be able to replace their personnel and pay criminal fines with ease.

In 1983 the Subcommittee on Crime began an extensive investigation of this problem. That investigation culminated in a vast increase in criminal and civil forfeiture authority in the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Acts of 1986 and 1988. With the passage of these laws, the Federal government was given much greater power to seize the fruits of drug related crime, and resulting statistics are astounding. For instance,

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in fiscal year 1988 the DEA reported it had seized assets totaling $655 million, an increase of $150 million over the prior year. The General Accounting Office stated in a Subcommittee on Crime hearing on April 24, 1989, that the Nation is now dealing with a "billion dollar" operation in seized assets which is an increase of over 3,200 percent over inventories in 1979 ($33 million). In the Southern District of Florida alone, the Miami division of DEA seized over $173 million in assets in 1988, an increase of about $41 million from the prior year.

And yet, there is no evidence of any lessening in drug trafficking. Worse—in the case of cocaine, our current national "drug of choice"—use is substantial, inventories are high, prices are down, and the cocaine sold on the streets has never been of a higher purity.

This is another indication that the overall problem has leaped in exponential terms, and probably is still growing. The Committee on the Judiciary does believe, however, that on the "supply" side at least, these new tools of forfeiture will eventually make a dent in drug trafficking. If comparable strides on the demand side and on our overall attitudes toward drug use could be made, meaningful changes in this cancer on our society might be achieved.

As the Committee expanded the Federal forfeiture process, it included a provision to allow "equitable sharing" of the funds of federally forfeited assets with State and local governments which participated in the enforcement action leading to the forfeiture.

The government also must greatly increase the efficiency with which seized assets are handled. Seizures are now in the billion dollar range, yet assets are being handled as if this were a "Mom and Pop" operation. The Committee's investigations indicate that some improvements have been made in this area. Considering the magnitude of this administrative operation, however, more must be done.

H.R. 2806 attempts to contribute in both of these areas. First, it clarifies an amendment which the Committee attached to the 1988 Anti-Drug Abuse Act (§ 6077) involving "equitable sharing". Second, it adds two provisions to expedite the processing of forefeited assets. This bill was developed in consultation with the Department of Justice and the National Association of Attorneys General.

SECTION 1

The first section of H.R. 2806 contains a clarification of § 6077 of the Anti-Drug Abuse Act of 1968 which relates to "equitable sharing" of forfeited assets with State and local law enforcement authorities.

The "equitable sharing" provision of the forfeiture law allows the Department of Justice to transfer forfeited assets to State and local agencies. It was included in the Comprehensive Drug Penalty Act of 1984 to encourage cooperation between the State and local agencies and the Federal Government in joint investigations. As such, the law provides that the local agency receives a proportion of the seized assets in "a reasonable relationship to the degree of direct participation of the State and local agency in the law enforcement effort resulting in the forfeiture, taking into account the

total value of all property forfeited and the total law enforcement effort . . . ." Since the passage of the law, cooperation and comity between State and locals and the Federal Government have increased dramatically. For instance, the Department of Justice shared $24.4 million in Fiscal Year 1988. It is estimated that in Fiscal Year 1989 this may reach $150 million.

It was the intention of the Committee on the Judiciary when it passed the "equitable sharing" provision that when State or local agencies participate in Federal investigations resulting in forfeiture, an equitable portion of the seized assets that reflects their contributions would go directly to the agency participating in the case. At the time of the enactment of this legislation, only 15 States had drug laws.

As a result of this vacuum in State forfeiture laws the Department of Justice decided to expand the "equitable sharing" concept to include what is called "adoptive forfeiture". This occurs when the investigative and prosecutive activity on a drug-related seizure is carried out exclusively by State and local agencies, who then ask the Federal Government to "adopt" the seizure, forfeit the property (usually in a civil administrative procedure) and after costs (10 percent) return the assets or the proceeds back to the State or local agency. This is possible since almost all violations of State drug laws are also violations of Federal laws. Although this was not contemplated during the Committee's original consideration of the "equitable sharing" legislation, it appeared to be a reasonable expansion of the doctrine. [(See for example *U.S.* v. *One Ford Corp. Automobile,* 272 U.S. 321 (1926) and *U.S.* v. *One Studebaker Seven Passenger Sedan,* 4 F(2d) 534, 535 (99th Cir. 1925)].

In the 1988 hearings of the Subcommittee on Crime on forfeiture, however, it came to the Committee's attention that certain local agencies appeared to be using this adoptive forfeiture process to circumvent recently passed State forfeiture laws. For example, in California, where about half of the total "sharing" in the Nation occurred, State law provided that 65 percent of the proceeds went back to the local law enforcement agency and 35 percent to education and treatment programs and local prosecutors. Since in the Federal process the local law enforcement agency would receive 90 percent of the proceeds, the local law enforcement agencies in that area were avoiding sharing funds with their colleagues by using the Federal adoptive forfeiture process. This, the Committee felt, not only offended the notion of Federal and State self-determination, it also used the Department of Justice resources to get around State law. Section 6077 of the Anti-Drug Abuse Act was drafted to address this concern and provides:

> The Attorney General shall assure that any property transferred to a state or local law enforcement agency . . . is not so transferred to circumvent any requirement of state law that prohibits forfeiture or limits use or disposition of property forfeited to state or local agencies.

This provision was to prohibit adoptive forfeitures which were designed to circumvent State priorities as expressed in State law. (California amended its law in January 1989 to increase the local law enforcement share to 75 percent.) However, the Department of Jus-

tice subsequently interpreted—(erroneously, in the committee's view) this section to not only preclude all adoptive forfeiture but indeed most equitable sharing in joint investigations. The committee also ascertained that in a few States there were specific State constitutional provisions which bring in question all "adoptive forfeitures" in those States.

The Committee therefore developed Section 1 of H.R. 2806, to solve this problem, and still maintain appropriate State and Federal cooperation in this area. Section 1 specifically limits its coverage to "adoptive" forfeitures and allows the U.S. Attorney General to rely upon an opinion of the Attorney General of the State in question to the effect that the adoptive forfeiture is not being used to circumvent State law. The Committee believes that such a written opinion can be general in nature if the State Attorney General so desires, but in such a situation the State Attorney General would be expected to monitor closely this process in his or her State. The decision, however, ultimately will be made by the U.S. Attorney General, and this essentially administrative matter would not be subject to review by any court.

SECTIONS 2, 3, AND 4

These sections will facilitate the expeditious sale and disposition of seized assets. Section 2 adds a provision to allow the Attorney General to warrant clear title to forfeited assets, which will facilitate the sale of real property. At the present time, civil forfeitures of real property are hampered by the reluctance of title insurance companies to provide title insurance for property obtained through the civil forfeiture process. This was documented by the General Accounting Office in its testimony before the Subcommittee on Crime. This authority will duplicate that now available under the criminal forfeiture statutes.

Section 3 deals with the problem involving large cash seizures which presently must go through the judicial process, but which are essentially default judgments in 99 percent of the cases, and should be subject to administrative forfeiture where appropriate. This section will allow the government to seize large cash amounts in the same fashion it can now seize conveyances with a value of $100,000 or more. This problem likewise was highlighted by the General Accounting Office in its testimony before the Subcommittee on Crime, and this section follows GAO's recommendation in this area. It still reserves all the rights of owners in contested cases.

Section 4 is a technical amendment.

COMMITTEE ACTION AND REPORT

On April 24, 1989, the Subcommittee on Crime held an oversight hearing on Federal Drug Forfeiture Activity. Appearing at the hearing were: Mr. James T. Moore, Commissioner, Florida Department of Law Enforcement, Tallahassee, Florida, representing his Department and the International Association of Chiefs of Police; Mr. Joseph W. Dean, Secretary, Department of Crime Control and Public Safety, North Carolina, representing the National Criminal Justice Association and the National Governor's Association; Mr.

Ralph Page, Crime Stoppers of Broward County; Mr. Gene L. Dodaro, Associate Director for Management Reviews, U.S. General Accounting Office, Washington, D.C., and other representatives of the General Accounting Office; Mr. Cary Copeland, Deputy Associate Attorney General, Department of Justice, Criminal Division; accompanied by representatives of the U.S. Department of Justice, Southern District of Florida; and Mr. William F. Riley, Comptroller of U.S. Customs Service and representatives of the U.S. Customs Service, Southeast Region.

Subsequent to this hearing Subcommittee Chairman Hughes (for himself, Mr. McCollum, Mr. Boucher, and Mr. Smith of Mississippi) introduced H.R. 2806 on June 29, 1989.

On September 14, 1989, the Subcommittee on Crime marked up H.R. 2806 and, a quorum being present, favorably reported the bill without amendments by unanimous voice vote to the full Committee.

On October 3, 1989, the Committee on the Judiciary considered H.R. 2806 and, a quorum being present, favorably reported the bill to the full House of Representatives by a unanimous voice vote.

JURISDICTIONAL CONCERNS OF COMMITTEE ON ENERGY AND COMMERCE

H.R. 2806 was referred jointly to the Committees on the Judiciary and Energy and Commerce. In order to permit expeditious consideration of H.R. 2806 by the House, the Committee on the Judiciary sought, and received, the agreement of the Committee on Energy and Commerce to forgo consideration of the bill by the latter Committee without prejudice to that Committee's jurisdiction over the Controlled Substances Act. The exchange of letters between the two Committees follows:

HOUSE OF REPRESENTATIVES.
COMMITTEE ON THE JUDICIARY,
Washington, DC, October 13, 1989.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: On October 3, 1989, the Committee on the Judiciary ordered reported H.R. 2806, to amend Section 511 of the Controlled Substances Act to make technical, clarifying, and administrative amendments, and for other purposes. The bill amends provisions, enacted in the Anti-Drug Abuse Act of 1988, relating to forfeitures of the proceeds of drug raids to law enforcement agencies. As you know, because the bill amends the Controlled Substances Act, it was jointly referred to the Committee on Energy and Commerce.

The issue addressed in H.R. 2806 is also the subject of provisions in several inappropriate vehicles, including two appropriation bills and the Department of Defense Authorization bill. In order to assure that this matter is handled expeditiously by the committee of legislative jurisdiction, the Committee on the Judiciary would like to bring H.R. 2806 before the House under suspension of the rules on October 16. In order to facilitate this effort. I am writing

to request the Committee on Energy and Commerce forego consideration of the bill and permit it be scheduled on the Suspension Calendar, without, of course, prejudice to your jurisdiction over the Controlled Substances Act. Your cooperation in this matter is greatly appreciated.

With every good wish, I am,

Sincerely,

JACK BROOKS,
Chairman.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
Washinton, DC, October 13, 1989.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I am in receipt of your letter of October 13, 1989, in reference to H.R. 2806, to amend Section 511 of the Controlled Substances Act to make technical, clarifying, and administrative amendments, and for other purposes.

This Committee understands the importance of scheduling H.R. 2806 for floor consideration in the near future. I have cleared the substance of the legislation with Members of this Committee and believe it would be appropriate at this time to schedule H.R. 2806 on the Suspension Calendar, as you recommended.

With best wishes.

Sincerely,

JOHN D. DINGELL,
Chairman.

SECTION-BY-SECTION ANALYSIS

The following is a section by section analysis of H.R. 2806, as reported by the committee on the Judiciary:

Section 1 rewrites Section 511(e)(3) of the Controlled Substances Act (21 U.S.C. 881(e)(3) by deleting subsection (e)(3)(B) and consolidating subsection (e)(3)A as subsection (3). It creates a new subsection (e)(4) which clarifies the Congress' intent in enacting former subsection (e)(3)B. It directs the U.S. Attorney General not to transfer property to "any State or local law enforcement agency" under Subsection e(1)(A) if such a sharing is an "adoptive seizure process" and that process was used to circumvent State law. The adopted seizure process is defined as one where all activity, e.g. investigations, seizures, and prosecutorial activity, were carried out under the aegis of State law and without any Federal activity or cooperation except for the actual forfeiture under this Section.

The Attorney General is allowed to rely on assurance from the State Attorney General that the intent of the "adoptive forfeiture" was not to circumvent their own laws, and this can be a general assurance. The bill makes this determination an administrative one by the U.S. Attorney General, which would not be subject to judicial review.

Section 2 is an amendment to Section 524(c) of Title 28 and is designed to increase the marketability of forfeited property by allowing the Attorney General to warrant clear title thereto. Currently, only the criminal forfeiture statutes, 21 U.S.C. 853(n)(7) and 18 U.S.C. 1467, 1963(l)(7) and 2253(m), expressly authorize the Attorney General to convey good title. The sale of forfeited property by quitclaim or general release deed has met growing resistance from the title insurance industry, which is apparently concerned about the validity of the title acquired by the government through non-criminal forfeiture proceedings. This amendment would obviate that concern and thereby permit the government to realize the full fair market value from the sale of all forfeited property.

Section 3 adds a new subsection (l) to § 511 of the Controlled Substances Act (21 U.S.C. 881) and allows the Attorney General to seize and forfeit moneys in the same fashion as the Federal government is allowed to seize and forfeit conveyances under § 607 of the Tariff Act of 1930.

In doing so it alleviates some of the problems of large cash seizures which at the present time must go through an extended judicial process if the amount is over $100,000 even though most of the cases end up as default judgments. This section allows the government to administratively seize these large cash amounts in the same fashion it can seize conveyances with a value over $100,000 under present law. It still reserves all the rights of owners in contested cases.

Section 4 is a technical amendment to correct a typographical error in the Anti-Drug Abuse Act of 1988.

Committee Oversight Findings

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

Statement on Budget Authority and Related Items

In compliance with clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee reports that no statement under section 308(a)(1) of the Congressional Budget Act of 1974 is required.

Congressional Budget Office Cost Estimate

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2806, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 5, 1989.

HON. JACK BROOKS,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 2806, a bill to amend section 511 of the Controlled Substances Act to make technical, clarifying, and administrative amendments, and for other purposes, as ordered reported by the House Committee on the Judiciary, October 3, 1989. We estimate that no cost to the federal government or to state or local governments would result from enactment of this bill.

H.R. 2806 would clarify that the current prohibition on transfers of forfeited property to state and local law enforcement agencies when such transfers circumvent state law applies only to property transferred following utilization of an adopted seizure process (i.e., "adoptive" forfeitures). The bill would allow the Attorney General to rely upon the written opinion of a state attorney general in determining whether a particular transfer would be in circumvention of state law.

The bill would also make explicit the Attorney General's authority to warrant clear title upon the transfer of forfeited property, as well as allow for the administrative forfeiture of large cash seizures.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

OVERSIGHT FINDINGS OF COMMITTEE ON GOVERNMENT OPERATIONS

In accordance with clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee states that, with respect to the subject matter of the bill, the Committee on Government Operations did not submit to the Committee findings or recommendations based on investigations under clause 4(c)(2) of rule X of the Rules of the House of Representatives.

INFLATIONARY IMPACT STATEMENT

In compliance with clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee states that the bill will have no inflationary impact on prices and costs in the operation of the national economy.

COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the Committee concurs in the estimate provided by the Congressional Budget Office and adopts that estimate as the cost estimate of the Committee.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 511 OF THE CONTROLLED SUBSTANCES ACT

FORFEITURES

SEC. 511. (a) * * *

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(e)(1) * * *

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[(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

([A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

[(B) is not so transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies.]

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based.

(4) The Attorney General shall assure that property is not transferred following utilization of an adopted seizure process to circumvent any requirement of State law that limits the disposition of property forfeited to State or local agencies. An adopted seizure process is one in which investigative and prosecutive activity related to the seizure (other than activity relating to the actual forfeiture) was carried out exclusively by State and local agencies. In determining whether the transfer would be in circumvention of State law, the Attorney General may rely upon a written opinion of the attorney general of the pertinent State that such a person is not being utilized to circumvent State law. A decision by the Attorney General under this subsection is not subject to review by any court.

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[(l)] *(k)* The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such

agreement as may be entered into between the Attorney General and the Postal Service.

(l) Notwithstanding any other provision of this title, the Attorney General may carry out seizure and forfeiture of moneys in the manner provided with respect to seizure and forfeiture of conveyances by the Secretary of the Treasury under section 607 of the Tariff Act of 1930.

SECTION 524 OF TITLE 28, UNITED STATES CODE

§ 524. Availability of appropriations

(a) * * *

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(c)(1) * * *

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(10) Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department, the Attorney General is authorized, at his discretion, to warrant clear title to any subsequent purchaser or transferee of such forfeited property.

[(10)**]** *(11)* For the purposes of this subsection, property is forfeited pursuant to a law enforced or administered by the Department of Justice if it is forfeited pursuant to—

(A) any criminal forfeiture proceeding;

(B) any civil judicial forfeiture proceeding; or

(C) any civil administrative forfeiture proceeding conducted by the Department of Justice,

except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the United States Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a) shall apply.

SECTION 6077 OF THE ANTI-DRUG ABUSE ACT OF 1988

SEC. 6077. RESTORATION OF EQUITABLE SHARING PRINCIPLE RELATING TO TRANSFER OF FORFEITED ASSETS TO STATE AND LOCAL AGENCIES UNDER THE CONTROLLED SUBSTANCES ACT.

(a) * * *

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(c) EFFECTIVE DATE.—Section **[**551(e)(3)(B)**]** *511(e)(3)(B)* of the Controlled Substances Act, as enacted by subsection (a), shall apply with respect to fiscal years beginning after September 30, 1989.

ADDITIONAL VIEWS OF HON. RICK BOUCHER, HON. HOWARD COBLE, AND HON. D. FRENCH SLAUGHTER, JR.

H.R. 2806 seeks to modify Section 6077(B) of the Anti-Drug Abuse Act of 1988 (PL 100-690); a provision which prohibits the U.S. Attorney General from distributing the proceeds from forfeited assets to any State or local law enforcement agency when the distribution would "circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies." The provision was originally drafted to address a legitimate concern that states not use adoptive forfeiture process to circumvent their own state laws. However, the U.S. Department of Justice narrowly construed Section 6077(B) to mean that all adoptive forfeitures are banned. An unqualified prohibition was not the intention of Congress, and the Justice Department's interpretation will endanger the adoptive forfeiture programs in a number of states.

Since the States of North Carolina and Virginia have Constitutional requirements that all assets from drug seizures be used for education, the unintended effect of the Justice Department's interpretation of Section 6077(B) is that North Carolina and Virginia will lose millions of dollars in revenue for State and local law enforcement efforts. We believe that if our states are to continue to fight the war on drugs, they can ill afford to suffer the loss of revenues caused by such interpretation.

We commend Chairman Hughes for his efforts to modify the language of Section 6077(B) and we hope that H.R. 2806 will be sufficient to correct the particular situation in North Carolina and Virginia. However, we fear that this may not be the case. Therefore, we will reserve the right to seek to delay the effective date of Section 6077(B) to enable the Legislatures in North Carolina and Virginia to amend their State Constitutions or to ask the full House to follow the recent action of the other body and repeal Section 6077(B) altogether.

RICK BOUCHER.
HOWARD COBLE.
D. FRENCH SLAUGHTER, Jr.

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